immediate control of accused as an A.P.C. and a member of the Govt. of Johore and that he required no licence under the Arms Enactment to justify his possession.

How far his plans for handing over the immediate control of the weapon to the informer were innocent is another matter, though it may be argued that as he knew the informer was a police informer and would in some way put the weapon into the hands of his employer and as it is agreed that he was acting in exercise of his duty to help the police informer, it may be that even these plans were justified.

This case has revealed the weakness of the system by which P.C.s are allowed to help informers. It is beyond doubt in my opinion that Embok, and Talib and Sampol were far more concerned with seeing that the informer should get a reward, of which they were to get a share, than with arresting the man who had the real possession of the rifle, i.e. Mat Dehan, though they could easily have done so. It is possible, of course, that Mat Dehan himself got the weapon from someone who was not an A.P.C. It should be made an offence for any P.C. to receive money or reward in any shape or form from a police informer for any help or information given to the informer. Otherwise, as is clear from this case, an informer and a band of A.P.C.s can conduct at the expense of Govt. a very profitable traffic in arms, by the A.P.C.s allowing the men whom they find with illegal arms to be trapped by an informer, rather than arrested instanter by themselves.

I hold that this rifle 'F' was, when in the possession of Talib, in the immediate control of the Govt. of Johore and therefore that in failing to have a licence to possess it Talib committed no offence. He will accordingly be acquitted and discharged.

The rifle 'F' will be confiscated and handed to the police authorities.

Accused acquitted.

HUJAH LIJAH BINTI JAMAL v. FATIMAH BINTI MAT DIAH.

[Orig. Civ. Juris. (Briggs, J.) February 15, 1950]

[Kota Bharu — Civil Suit No. 66 of 1949]

Harta Sapencharian — Malay custom modifying Muslim Law — Law of Kelantan — Courts Enactment, Kelantan, 1925 — Courts Enactment, Kelantan, 1938 — Land Enactment, Kelantan, 1938, s. 95.

The plaintiff in this case, the lawful widow of Haji Che Mis bin Samat deceased, claimed as **harta sapencharian** one half-share of certain land registered in the Mukim Register in the name of the deceased. The District Officer before whom she made the claim under the provisions of section 95 of the Land Enactment, 1938, referred the matter to the Supreme Court.

Held, (1) that in Kelantan a claim for **harta sapencharian** can be brought as an ordinary suit in the High Court but that if the value of the property claimed is under $500.00 the Court would ordinarily refuse jurisdiction in favour of the Kathi or Chief Kathi's Court; (2) that if a case is referred to the Court under s. 95 of the Land Enactment, 1938, the High Court must entertain it if the Sessions Court cannot; (3) that on the facts the claim for a half-share of the land as **harta sapencharian** had been substantiated and therefore judgment must be given for the plaintiff.

Cases referred to :—

(1) *Coventry v. Willes* (1863) 12 W.R. 127.
(2) *Goodwin v. Roberts* (1875) L.R. 10 Exch. 337.
(3) *Ramah v. Laton* 6 F.M.S.L.R. 128.

CIVIL SUIT.

Parties in person.

The facts and arguments sufficiently appear from the Judgment.

Cur. Adv. Vult.

Briggs, J. : — The plaintiff is the lawful widow of Haji Che Mis bin Samat deceased and the defendant is his niece and the administratrix of his estate. The plaintiff claims one half-share of certain land registered in the Mukim Register in the name of the deceased as "*harta sapencharian*". She first made this claim before the District Officer under the provisions of section 95 of the Land Enactment. Under sub-section (vi) the District Officer certified the existence of a dispute and directed her to apply to the Supreme Court. He certified the value of the half-share in issue as $527.09.

The phrase *harta sapencharian* I understand to mean "acquired property", with the specialized meaning in this context of "property acquired during the subsistence of their marriage by a husband and wife out of their joint resources or by their joint efforts". The "acquisition" referred to may extend to cover mere enhancement of value by reason of cultivation or development. The phrases *harta sharikat* and *harta charian laki bini* appear to be synonymous with *harta sapencharian* in this context. The juristic effect of a claim by a widow that land registered in the name of her deceased husband is *harta sapencharian* was considered at length in an article by Mr. Justice Taylor entitled "Malay Family Law" and printed in Part I of Vol. XV of the Journal of the Malayan Branch, Royal Asiatic Society, (May, 1937), where several

cases on the subject, including some unreported elsewhere, are reported and discussed. On full consideration of those cases and of the views of the learned author, I think there can be no doubt that the rules governing *harta sapencharian* are not a part of Islamic law proper, but a matter of Malay *'Adat*. Again the claim by a widow for a share of *harta sapencharian* is not a claim for a share of the deceased's estate, but a claim adverse to the estate for property of the claimant held in the name of the deceased. This branch of Malay *'Adat* is recognised throughout the State of Kelantan among peasant landowners and the share normally considered to belong to a widow is one half, apart from any question of her claim to a distributive share in the deceased's estate. Whether the *'Adat* in this respect amounts to a part of the general law of Kelantan, or is mere usage, is probably not material. It is not in the strict sense a custom, since it is not confined to any particular locality, *Coventry v. Willes*[1]. Assuming that it is mere usage, there is no reason why effect should not be given to it. If it affected the distribution of the deceased's estate, it would no doubt conflict with Islamic law on the subject, and might then be unenforceable, *Goodwin v. Roberts*[2]. But it merely affects the quantum of the estate available for distribution. It is, in my opinion, both fair and reasonable. In view of the clear recognition of *harta sapencharian* both in various states and by the Courts, I am prepared to hold that the rules governing it now form part of the general law of the State applicable to peasant landowners. Its possible application to other persons is not now in issue. I can find no reported cases relating to *harta sapencharian* in Kelantan, but an interesting unreported judgment of Mr. J. D. M. Smith, then Judicial Commissioner, given on 18th February, 1936, survives and is set out in full in a foot-note hereto.

As it decided that in at least some cases of claims to *sapencharian* property the High Court had then no jurisdiction, it seems necessary to consider the question of jurisdiction as it stands now.

The law has changed substantially since that date. The Land Enactment, 1936, was repealed by the Land Enactment, 1938. Notice No. 33 of 1919, which is set out in full in the judgment referred to, was not then expressly repealed and may still be in force. It is to be observed that while the English version of the Notice leaves the matter in some doubt, the Malay version shows in terms that the subject matter of the Notice is *sapencharian* property. The Courts Enactment, 1925, was replaced by the Courts Enactment, 1938, which was in turn repealed by the Federation Courts Ordinance, 1948, "except the provisions relating to the Courts of Kathis and Assistant Kathis and appeals therefrom". It is not immediately clear how much of the Kelantan Enactment is saved by this exception. It will be necessary to revert to this point.

The origin of the first Shara'iah Court in Kelantan, which was in Kota Bharu, is not easily ascertainable. It seems clear, however, that it was not a creature of statute. It existed, and no other Shara'iah Court did exist, when the Regulation of A.H. 1327 now called "the Shara'iah Courts Regulation" was passed about 1907. There was then no justification for the plural. The word is "Mahkamah" and the Regulation referred to one Court only. Another Shara'iah Court is believed to have been opened in Kuala Krai in 1909, and another again in Pasir Puteh in 1910.

It may be noted that, as a matter of nomenclature, Shara'iah Courts should be courts of the *Hukom Shara'*, not of Malay *'Adat*. The jurisdiction of the Shara'iah Court to deal with questions of *harta sapencharian* should therefore on principle be merely statutory, and in fact it appears to have depended in the first place on Notice No. 19 of 1916. A translation of the relevant passage is as follows :—

"Cases that can be instituted in and heard by the Sharaiah Court (or Courts) are as follows:—

1. .....
2. disputes concerning property between husband and wife which does not exceed $100/-.
3. .....
4. .....

All matters mentioned above can be appealed to the High Court except matters mentioned hereunder in which appeal must be made to the "MAJLIS UGAMA ISLAM DAN ISTI'ADAT MELAYU", namely:

1. .....
2. .....
3. .....
4. division of sapencharian property on divorce ....."

Apart from the monetary limit, it is clear that *all* types of claims to *sapencharian* property could then be entertained in the Shara'iah Court. Some types were appealable to the High Court and some to the Council of Islamic Doctrine and Malay Customary Law. If this Regulation is borne in mind, it appears that Notice No. 33 of 1919 did not confer a new jurisdiction, though it may have extended it as regards monetary limit in certain cases. It laid down new procedural rules. Notice No. 27 of 1922 enlarged the jurisdiction given by Notice No. 19 of 1916 by substituting a limit of $400/- for $100/-. This seems clearly to show that Notice No. 33 of 1919 was

not intended to confer unlimited jurisdiction even in the limited class of cases to which it applied.

A more serious difficulty springs from the Courts Enactment, 1925. This is intituled "an Enactment to define the constitution and powers of the Courts in the State of Kelantan". It "supersedes" (Section 1) the Courts Enactment 1910. Section 2 provides:—

"2. The Courts for the administration of civil and criminal law in the State of Kelantan shall be as follows:—

(a) the High Court.
(b) the Court of a Magistrate of the First Class.
(c) the Court of a Magistrate of the Second Class.
(d) the Court of the Mufti.
(e) the Court of the Chief Kathi.
(f) the Court of a district Kathi.
(g) the Court of a Penggawa.

Sections 6, 7 and 8 provide:—

"6. The Court of the Mufti shall consist of the Mufti and shall have jurisdiction to hear and determine appeals from any judgment or order of a Court of a Kathi in suits between Mohammadans in respect of the following matters:—

(i) Marriage and Divorce.
(ii) Dissolution of Marriage.
(iii) Maintenance.
(iv) Division of property on divorce.
(v) Property of orphans.
(vi) Tithes (Zakat) and Offerings (Fitrah).
(vii) Illicit intercourse.
(viii) Forbidden food and drink.
(ix) Breach of the Fast.
(x) Absence from Friday prayers (Jema'at).
(xi) Teaching false doctrine.
(xii) False religious practices.
(xiii) False profession of faith and bringing the Mohammedan religion into contempt.
(xiv) Registration of Converts.
(xv) Perversion from the Mohammedan Faith.

7. The Court of the Chief Kathi shall consist of the Chief Kathi and shall —

(a) in its criminal jurisdiction try any offences specified in section 6 of this Enactment and also any case of assault between husband and wife, where such assault does not amount to an offence under Section 5 of the Kelantan Penal Code.
(b) in its civil jurisdiction hear and determine any suits within its local jurisdiction arising out of the matters specified in item (Sic) (i) to (vi) in section 6 or connected with inheritance of property of Mohammedan (Sic) where the value in dispute does not exceed $400.

8. The Court of a district Kathi shall consist of a Kathi and shall have similar jurisdiction to that of the Court of the Chief Kathi, provided that in its civil jurisdiction it shall not hear any suit where the value in dispute exceeds $100."

It seems perfectly clear that the intention of the legislature was to define fully the jurisdiction of *all* Courts in the State, including the Shara'iah Courts, which were not mentioned in the 1910 Enactment. Why the previous provisions of law defining the jurisdiction of the Shara'iah Courts were not then expressly repealed in the same way as those relating to the ordinary Civil Courts is not clear. It may have been pure oversight.

In 1916 the hierarchy of ecclesiastical Courts in Kelantan was simply, at first instance, any Shara'iah Court (since the jurisdiction of all of them appears to have been the same) and, on appeal, either the High Court or the *Majlis Ugama Islam dan Isti'adat Melayu* according to *subject*. In some matters there was a pecuniary limit of jurisdiction affecting the Shara'iah Courts and in that event the High Court had original jurisdiction. The Courts Enactment, 1925, substituted a different organisation, comprising, at first instance, either the Court of a District Kathi or the Court of the Chief Kathi, the former having a lower limit of value in civil matters, and, on appeal, either the High Court or the Court of the Mufti, a new creation which replaced the *Majlis* for the same range of subjects. In the particular case of *"harta sapencharian"*, even the Chief Kathi had only jurisdiction up to $400/-, and could only deal with such a claim when it arose on divorce — not on death or *inter maritos*. This was a complete change from the previous law. I think the differences are sufficiently great to make it clear that the old organisation of the Shara'iah Courts had ceased to exist, and that the jurisdiction given by the new Enactment was substituted for the old jurisdiction. Any other conclusion leads at once to direct conflicts as regards the jurisdiction conferred on one side by the Notices and on the other by the Enactment. A District Kathi's Court is, in the ordinary sense, a Shara'iah Court: but after 1925, was its limit of jurisdiction in a dispute between husband and wife as to division of property on divorce $400 or $100? It is impossible to say. I think the true explanation may be that the legislature in 1925 considered that formal repeal of legislation effected by Notice only was not necessary and that, where a codifying and consolidating statute like the Courts Enactment, 1925, was passed, it would automatically be assumed to repeal and replace the earlier Notices. Whether or not that is correct, I think it did so, at least as regards the jurisdictional provisions contained in such notices. Procedural provisions may have survived.

An important feature of the 1925 Enactment is that the High Court is given unlimited original jurisdiction in all matters civil and criminal. There is no exception of matters normally thought to be particularly within the purview of the Shara'iah Courts, and in some cases the High Court *must* determine such matters at first instance. Among these would be a claim to *harta sapencharian* arising on the death of

the husband, or if over $400 were in issue, arising on divorce.

If this line of argument be correct, the learned Judicial Commissioner's judgment would appear to be in error. It does not refer at all to Notice No. 19 of 1916 or No. 27 of 1922, which are obviously jurisdictional, and I think it was impossible to construe correctly Notice No. 33 of 1919 without the former of these in mind. It must, I think, be conceded that in 1918 a claim to *harta sapencharian* could have been made in the High Court if the amount thereof were, say $1,000. Where else could it have been made? Notice No. 33 of 1919 appears to me to be a matter of machinery: it prescribes procedure when a claim within the jurisdiction of the Shara'iah Court is properly before it. I agree that section 29 of the Land Enactment, 1926, did not affect the jurisdictional position. It is unfortunate that nothing is said in the judgment about the amount of the claim. It is possible that the value was less than $400: but even so I fail to see how the jurisdiction of the High Court could be ousted, though it might then decline jurisdiction. If the provisions of Notice No. 19 of 1916 are overlooked, No. 33 of 1919 might well be construed as giving jurisdiction without limit as to value. The judgment recognizes the inconvenience of the conclusion that the Notice is still in force and that a conflict with the Courts Enactment, 1925, results. I prefer to adopt the other solution and to say that Notice No. 19 of 1916, as amended in 1922, was impliedly repealed and that Notice No. 33 of 1919 could after 1925, and can now, apply only as a matter of procedure to claims within the terms of the Courts Enactment in force for the time being. It has no reference to the High Court in its original jurisdiction and in no way affects or limits its jurisdiction to entertain claims to *harta sapencharian*.

I am fortified in my determination to differ from the learned Judicial Commissioner by a consideration of which he could not be aware. In 1937, about a year after the date of his judgment, Notices Nos. 19 of 1916 and 27 of 1922 were expressly repealed by the *Obsolete* and *Superseded* Legislation (Repeal) Enactment, 1937. The legislature apparently shared my view that they were moribund after 1925. But their importance for purposes of construing Notice No. 33 of 1919 is unaffected.

By Section 21 (b) of the Courts Enactment, 1938, the Court of a Kathi has jurisdication to hear suits relating to "division of sapencharian property" where the subject matter does not exceed $250/- in value. No distinction is drawn between cases arising *inter maritos*, on divorce and on death. By Section 22, the Court of the Chief Kathi has similar jurisdiction up to $500/-. There can, I think, be no doubt that a Chief Kathi is a "Kathi" within the meaning of the saving to the repeal of the Enactment and that his Court survives. Section 23 provides as follows :—

Civil matters beyond the jurisdiction of Kathis.

23. When the value in dispute in any matter mentioned in section 21 (b) exceeds $500/-, such matter shall be heard and determined by the Judicial Commissioner sitting with the Chief Kathi or Mufti and the Judicial Commissioner in determining such matter shall follow the advice of the Chief Kathi or Mufti in any question of Islamic Law."

This section appears at first sight to constitute a special tribunal, but I think that in fact it merely prescribed a special procedure for certain proceedings in the High Court. This view is perhaps confirmed by section 24, which reads :—

Appeal.

24. An appeal shall lie to His Highness the Sultan from any decision of the Court of a Kathi or of the Chief Kathi or **of the Judicial Commissioner when acting under the provisions of section 23,** and the decision of His Highness the Sultan on such matter shall be final.

In any event, I am satisfied that section 23 is repealed. Even if the Chief Kathi sat as part of the Court, and not as a special assessor or adviser, the Court could not be properly described as the Court of a Kathi. If he was only assessor or adviser, *a fortiori* the section has gone. Section 24 remains, with the exception of the words "or of the Judicial Commissioner when acting under the provisions of section 23", which are repealed.

It is desirable in passing to mention section 25. This was a provision similar in effect to the Mohammedan Law and Malay Custom (Determination) Enactment (Cap. 196) of the F.M.S., with the important differences that it covered only matters of Islamic Law, not those of Malay Custom, and reference was not to the State Council, but to the Mufti. It is clear that this section is repealed, thus restoring in Kelantan the inconvenient legal situation revealed by the majority decision of the Court of Appeal in *Ramah v. Laton*[3] under which the Supreme Court must itself ascertain and determine the Islamic Law applicable in any case, without hearing evidence thereon. The law of Kelantan urgently requires amendment in this respect, and it may be thought that the obscurities and difficulties relating to the present position of Shara'iah Courts could best be remedied by a consolidating enactment dealing also with the constitution, jurisdiction and procedure of such Courts, and with appeals therefrom. At the same time the

position of the *Majlis Ugama Islam dan Isti'adat Melayu* and the relationship between Islamic law and Malay *'Adat* could be reviewed and placed on a more easily understandable footing. If such an enactment were passed, a mass of old legislation could be repealed with great advantage to those who have to attempt to administer it, and frequently have no copies thereof with which to do so. Any such enactment should of course be gazetted both in English and Jawi versions.

Having considered the matter from, so to speak, the point of view of the Courts, one must consider it also from the point of view of a District Officer under Section 95 of the Land Enactment, 1938. Claims to *harta sapencharian* relate in most cases to land to which that section applies, and can certainly be made quite properly by means of that section, provided that the estate is properly represented. I am informed that not infrequently they are so made and are settled by consent under subsection (v). If a claim is disputed, the claimant is referred to "the Court", which, as defined in subsection (vii), "in the case of any claim in respect of land not exceeding $500/- in value, means the Court of a Magistrate having jurisdiction to hear and determine disputes relating to land, and in all other cases means the High Court." Before 1946 this meant that in cases under $500/- a Magistrate who was also a District Officer, or the Magistrate of the Central Court, could hear the suit. Now no Magistrate can hear any such suit (Courts Ordinance, 1948, Sections 69 and 93), but a President of Sessions Court can do so, "if all parties interested consent" (ibid. Section 71). Failing such consent, only the High Court has jurisdiction.

The claim to *harta sapencharian* arises most frequently in practice on applications for summary distribution of small estates. I am informed by a Magistrate who has considerable experience of these in Kelantan that the practice is to regard such a claim as one of the factors to be considered in attempting to formulate an agreed scheme of distribution, and that such agreed schemes very often give full effect to the claim. If agreement is not reached, the parties are referred to the Kathi. Whether he insists on a formal suit, or certifies after informal enquiry in the same way as he certifies the shares in which the estate descends to the *waris*, does not appear. He would have jurisdiction under Section 23 of the Courts Enactment, 1938, and the officer making the summary distribution order would give effect to his decision. This procedure has great advantages of convenience. Agreed schemes of distribution are expressly sanctioned by Section 17 of the Administration Enactment, 1930, and are in accordance with the principles of the Islamic law of inheritance. There seems to be no reason why they should not provide for the claims of creditors as well as beneficiaries of the estate, although this is not mentioned in the section. So long as it is appreciated that the claimant of *harta sapencharian* is a creditor and not a beneficiary, no harm is likely to be done.

I hold that in Kelantan a claim for *harta sapencharian* can, in any circumstances in which it lies, be brought by ordinary suit in the High Court, but that, if the value of the property claimed is under $500/-, the Court would ordinarily refuse jurisdiction in favour of the Kathi's or Chief Kathi's Court, on the principle that proceedings should ordinarily be brought in the Court of the lowest status which can entertain them. I hold that, if a case is referred to the Court under Section 95 of the Land Enactment, 1938, the High Court must entertain it, if the Sessions Court cannot. In that particular case, the Kathi or Chief Kathi has no jurisdiction. From the point of view of the claimant, where the value is small and the land is held under the appropriate title, the remedies of suit before the Kathi and application under Section 95 are alternative. The latter, if selected, may lead him to the High Court. In view of this I am satisfied that I have jurisdiction to grant the relief prayed in this suit.

I should mention that the parties appeared in person and no argument was addressed to me by either of them on any point of law.

On the facts I find no difficulty. The plaintiff's evidence, which was fully corroborated by her witnesses, proved that prior to her marriage she owned certain land inherited from her parents. Her husband owned no land. She and her husband both worked her land and saved money from its produce. Neither of them had any other source of income. From their savings more land was bought and again it was worked by both of them. It was padi land and is the subject matter of the action. I find and hold that it was *harta sapencharian*. An element of possible doubt was introduced when it appeared that certain rubber land was later purchased in the joint names of husband and wife. She explains that this was done after her pilgrimage to Mecca, when she knew more about her own rights and affairs generally. I do not think it affects the matter. She explains also that in the first place she and the defendant went together to apply for letters of administration of her husband's estate and that she expected to obtain a grant; but later the

defendant went alone and obtained the grant in her absence. Hence the issue of *harta sapencharian* was not raised at that time. Again, I do not think this affects or discredits her claim now. The witnesses Haji Abdul Rahman bin Haji Hassan and Haji Awang Besar bin Haji Mamat impressed me as being honest and truthful. The defendant offered no evidence. Although remembering that this is a claim against the estate of a deceased person and so should be regarded critically, I was fully satisfied. I saw no reason why the widow's share should not be a full one-half of the land in issue. Except in cases of consent orders, I am not aware of any case in Kelantan where a smaller fraction has been given, and the plaintiff's rights are better founded than usual, in that the original money-making of the spouses was her land.

I think that the defendant must have been fully aware of the true position and that her opposition to the claim was not undertaken in good faith for the benefit of the estate, but was purely for her own benefit. I accordingly ordered payment of costs out of her share of the estate, and in default by her personally.

Judgment accordingly.

APPENDIX.

J. D. M. Smith, Judicial Commissioner:— Wan Kelsom, wife of Taib bin Said, sues her husband for ½ share in 4 pieces of land in Lubok Gong Mukim on the ground that these 4 pieces of land are harta sepencharian.

My notes of 30.12.35 read:—

"Parties in person. Defendant denies claim in toto. There is some doubt as to jurisdiction — I cannot discover whether Notice 33/19 is still in force or not. In the meantime I suggest the desirability of an amicable settlement — plaintiff is prepared to negotiate. I wish also to examine the L.O. register — it appears from defendant's settlement (statement?) that miliki 57 no longer exists. The plaintiff can if she wishes have attachment on all the lands which are mentioned in her plaint".

2. Notice No. 33/19 reads:—

English version.

It has pleased His Highness the Sultan in Council to declare as follows:—

If husband and wife own land jointly it shall be lawful for either of them either while they are still married or after they are divorced to apply to the Ecclesiastical Court for an order to divide such land between them. The Judge of the Ecclesiastical Court, if he sees fit after due enquiry to do so, shall make an order directing that such land be divided between the parties. A certified copy of this order shall be served by the Court on the Superintendent of Lands, Kota Bharu, or the District Officer, as the case may be, who shall proceed to give effect to it by subdividing the land and issuing a separate title to each of the parties for his or her share.

2. Any party dissatisfied with the subdivision made by the Superintendent of Lands or District Officer, can appeal to the High Court.

Malay version.

Bahwa telah suka Duli Yang Maha Mulia Sultan Mohamed Yang Ke-empat K.C.M.G. yan di-pertuan Negri Kelantan serta ta'alok jajahan-nya di-dalam per-himponan Meshuarat Council mengluar-kan sabda seperti yang tersebot di-bawah ini:—

1. Barang bila sa-orang laki dan bini yang ada ber-sama2 sekali memiliki tanah (yang di-kata-kan sepencharian) maka ber-kuasa-lah mana2 sa-orang daripada mareka itu pada masa ia berlaki bini atau kamudian daripada ia ber-cherai di-antara kedua-nya meminta' kepada Mahkamah Shara'iah suatu hukoman membahgi-kan tanah itu di-antara mareka-itu. Maka jikalau Hakim Mahkamah Shara'iah nampak-nya patut di-perbuat sebagitu lepas daripada siasat preksa hendak-lah ia memberi suatu hukoman memprentah-kan membahgi tanah itu di-antara kedua pehak itu maka hendak-lah Mahkamah Shara'iah menghantar-kan suatu salinan atau copy hukoman yang sah ini kepada Ketua'an Office Tanah Kota Bharu atau kepada Ketua'an Jajahan mengikot mana2 satu daripada-nya dan hendak-lah Ketua'an ini menyemporna-kan hukoman itu dengan membahgi-kan tanah itu dan mengluar-kan suatu grant atau surat miliki yang suku kepada masing2 pehak menentu-kan hak bahgian laki dan hak bahgian bini.

2. Mana2 suatu daripada pehak itu jikalau berasa mishkil atau tiada puas-hati dengan bahgian yang di-perbuat uleh Ketua'an Office Tanah atau Ketua'an Jajahan itu buleh-lah appeal kepada Mahkamah Yang Maha Tinggi demikian-lah ada-nya.

It places with "the Ecclesiastical Court" jurisdiction in claims for sepencharian land made either during marriage or after divorce. This notice appears to have had its origin in B.A.O.M. 197/1919 the docketing of which reads "Asks that separate grants may be issued in respect of land jointly owned by her and Mandor Dris her husband whom she has divorced." I cannot trace the origin of the inclusion in Notice 33/19 of claim during marriage.

3. In 1919 the Courts Enactment 1910 was in force: that enactment contains no mention of an Ecclesiastical Court, but the Shara'iah (Ecclesiastical) Courts Regulation of 1327 (= 1907 A.D. circa) was in force — and still is in force: in fact, in the first chronological list of the Kelantan Laws issued in 1927 Notice 33 of 1919 appears on page 8 under the Ecclesiastical Courts Regulation of 1909 with the remarks "Secharian land: powers of Court" and does not appear as an independent law in the index. In the Chronological lists of 1930 and 1932 Notice 33 of 1919 is shown as an independent law under the heading "Muhammedans, division of property between husband and wife".

4. The Land Enactment 1926 came into force on 1 August, 1926: its section 1 states that "notices conflicting with this Enactment are hereby repealed" while its section 29 reads:—

"(i) After the expiration of 18 months from the date of this Enactment no claim to "harta secharian" in land shall be held to be valid in any Court unless such claim has been made to, recorded by and reported in writing to the Land Office by the Imam at the time of divorce.

(ii) Where any claim for "harta secharian in lands has been made to recorded and reported to the Land Office by the Imam the claimant may file a suit in respect thereof within a period of one year from the date of divorce. After the expiration of one year from the date of divorce no such claim may be accepted by any Court."

Does Notice 33 of 1919 conflict with the Land Enactment 1926? Section 29 of the Enactment is for practical purposes merely a form of limitation upon harta secharian claims after divorce and I do not see that Notice 33 of 1919 can be held to conflict. Enactment 8 of 1928 in its sections 4 and 5 and Schedules I and II endeavoured, I think, to clear up the doubts which section 1 of the 1926 Enactment at once raises — doubt of interpretation: in those Schedules there is no mention of Notice 33 of 1919. Section 29 of the Land Enactment 1926 was repealed by Enactment 3/30 which amended the 1926 Enactment: at the same time, the Limitation Enactment No. 4 of 1930 was passed and items 94A and 94B in its Schedule refer to harta secharian claims by divorced persons or by

widows or widowers — again no reference to claims during marriage. It must, I think, be held that Notice 33 of 1919 is in force at present and that its existence ousts the jurisdiction of the High Court in this case: this opinion may appear to be contrary to certain of the provisions of the Courts Enactment 1925 but that Enactment is itself unsatisfactory and its meaning open to doubt in certain parts.

5. Under these circumstances I cannot do otherwise than dismiss the claim of Wan Kelsom, but I do so with reluctance and only because of Notice 33 of 1919. Since the legal position was obscure, I allow no costs to either party — but I think that the State should refund all fees paid by Wan Kelsom in this claim. She should be told that, if she does not settle this claim amicably with her husband and desires to sue him further, she must do so in the Court of the Chief Kathi.

JUSOH BIN AWANG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Briggs, J.) February 20, 1950]

[Kuala Trengganu — Criminal Appeal No. 10 of 1949]

Criminal Procedure Code, s. 113 — Statement made to Police Officer put to witness to impeach his credit — Practice — Evidence Ordinance, ss. 145 and 155.

In this case in the course of the trial of the accused the Prosecuting Officer asked the Court to refer to a statement made by one of the prosecution witnesses to the Police and the learned President of the Sessions Court allowed this to be done. The statement recorded by the Police was not proved but the statement was marked as an exhibit.

Held, (1) that as the statement was not proved, it could not be proved in evidence; (2) that the learned President had in effect admitted in evidence matter prejudicial to the accused, which was never proved against him and on which he had no opportunity to cross-examine and therefore the conviction must be set aside.

Case referred to :—

(1) *Mutusamy v. Public Prosecutor* (1948) M.L.J. 57.

CRIMINAL APPEAL from Sessions Court.

Che Maidin bin Mohamed Ibrahim (Pleader) for the appellant.

L. A. Massie (D. P. P.) for the respondent.

Briggs, J. : — I allowed this appeal and set aside the conviction and sentence on a question of illegality under Sec. 113 of Criminal Procedure Code.

Mohamed bin Mat Zin, an uncle of the accused and a witness for the prosecution, apparently "failed to come up to his proof". The Prosecuting Officer asked the Court to refer to his statement and the learned President noted, "material difference" and granted "leave". It does not appear, what the Prosecuting Officer was given leave to do but no doubt the reference is to Sec. 155 of the Evidence Enactment. The accused was not furnished with a copy of the statement, but apparently he did not ask for it. The Prosecuting Officer then cross-examined the witness. The witness admitted having made a statement to a particular Police Sergeant.

The learned President's note proceeds :—

"(Certain portion of the statement read — marked A in blue pencil — admitted P1. Intld. M.M.H.).

I did not make that statement which has been read out to me".

No attempt was made to prove the document in question by the evidence of the Sergeant who took it, although he was present. It was, however, marked as an exhibit and included as such in the appeal record. This is a clear illegality.

It has often been stressed by the Court of Appeal and the High Court that, where an alleged statement put to a witness is denied, it must be formally proved — so often, indeed, that I was at first inclined, on reading the learned President's note, to suppose that he must have intended the document to be marked only for identification; but clearly this was not so. If that had been done, and the statement had not thereafter been proved, the attempt to impeach the witness's credit under Sec. 145 of the Evidence Enactment would have failed, but there would have been no irregularity. If the witness was to be believed, his evidence was useless either to the Prosecution or the Defence. If it was not to be believed, it was equally useless. In these circumstances, an application under Sec. 113 can serve no useful purpose. In cases where the witness actively assists the Defence, an application may well be necessary, but that was not the case here.

In effect, the learned President admitted in evidence matter prejudicial to the accused, which was never proved against him, and on which he had no opportunity to cross-examine.

Perhaps the clearest exposition of the law on this matter is that contained in the Judgment of Taylor J. in *Mutusamy v. Public Prosecutor*[1] a judgment with which I respectfully agree, and which all Presidents and Magistrates would be well advised to study.

Conviction set aside.

PUBLIC PROSECUTOR v. TEOH KIM KIEW.

[App. Crim. Juris. (Callow, J.) February 20, 1950]

[Kedah — Criminal Appeal No. 1 of 1950]

Finance Regulations Proclamation, Regulation 5(2) — Admissibility of statement made by an accused person to a Customs Officer.

The point raised by the Public Prosecutor in this appeal was whether the statement made by the respondent to a Customs Officer was rightly rejected by the